In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 880

DELANO B. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1970. A petition for rehearing was denied on October 2, 1970. The petition for a writ of certiorari was filed on October 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission into evidence of a third-party conversation as background evidence of a

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directly proven narcotics transaction constituted prejudical error in the circumstances of this case.

2. Whether the admission into evidence of cocaine seized during a search of a movable vehicle requires reversal of independently proven heroin convictions.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted on two counts charging the illegal sale of 23.880 grams of illegally imported heroin on August 18, 1967, in violation of 21 U.S.C. 174 and 26 U.S.C. 4705(a), and the illegal importation of 24.700 grams of cocaine on August 21, 1967 in violation of 21 U.S.C. 174 (Tr. 167–169, 173).[1] He was sentenced to concurrent six-year prison terms on each count (Tr. 191). The court of appeals affirmed *per curiam*.

The record shows that an agent of the Federal Bureau of Narcotics placed a telephone call on August 8, 1967 regarding a proposed purchase of heroin. The agent initially testified that the call had been to petitioner. It shortly became apparent, however, that the call had not been to petitioner, but to a confederate named Coleman.[2] The testimony was corrected (Tr. 56), but an objection was made to its admission on grounds of hearsay. Government counsel stipulated that the testimony was not to be admitted to show the truth of the conversation but to show setting. The trial judge

[1] "Tr." designates the one-volume trial transcript which we are lodging with the Clerk.

[2] Coleman was indicted with petitioner but not tried with him.

admitted the testimony for this limited purpose and instructed the jury accordingly (Tr. 13–22). The agent then testified that he met with petitioner that same day and purchased heroin from him (Tr. 28–31).

On August 21, 1967 the agent called petitioner with respect to a previously arranged purchase of cocaine. He went to petitioner's apartment, bringing the purchase money with him. Petitioner left with an unidentified male and returned a short time later. The other person drove off, and petitioner and the agent went to the apartment. Petitioner told the agent that the cocaine was in his car and gave the agent the keys. The agent told petitioner that he had to get the money from his car and returned the keys to petitioner. The agent went outside and signalled other agents who arrested petitioner inside his apartment as he was attempting to put his car keys down the garbage disposal. The keys were used to open petitioner's car and the cocaine was seized (Tr. 40–54, 80–84). A motion to suppress the cocaine as the product of an illegal search was denied (Tr. 84–92).

ARGUMENT

1. The actual purchase of heroin from petitioner on August 8, 1967 was established by the testimony of the purchasing agent who dealt directly with petitioner (Tr. 25, 28–31). The testimony of the agent concerning the phone conversation he had earlier that day was not offered for the truth of the statements contained therein but for the limited purpose of illuminating the events relating to the purchase of the heroin. The jury was appropriately instructed that

the conversation was "not offered for the truth or falsity of what was there said but for a different and limited purpose of indicating apparently what arrangements were made and to throw light on subsequent events" (Tr. 19). In this setting, petitioner's claim (Pet. 6–8) that he was denied his right of confrontation is wide of the mark.[3]

2. The two counts relating to the heroin transaction on August 8 were proven by direct evidence concerning those transactions. While not arguing otherwise, petitioner contends that introduction of the cocaine nevertheless tainted his convictions on those counts in light of the fact that the court below deemed the conviction involving the August 21 cocaine transaction invalid under *Turner* v. *United States,* 396 U.S. 398.[4] There can be little doubt that the jury was able to distinguish between the separate evidence relating to the discrete heroin and cocaine transactions which occurred two weeks apart. It is plain, moreover, that the cocaine was properly admitted as the fruit of the incidental search of a movable vehicle.

Petitioner had informed the undercover agent of its location in the trunk of his car and was attempting to dispose of the keys when arrested. The agents had reason to fear that petitioner had an accomplice in

[3] The agent's inadvertent references to petitioner as the recipient of that call were completely corrected (Tr. 56). There could have been no doubt in the jury's mind that Coleman and not petitioner was the party that the agent called.

[4] This was presumably because the trial court instructed the jury that proof of possession of the cocaine would authorize the jury in concluding that petitioner knew it had been illegally imported (Tr. 169; see *Turner*, *supra*, 396 U.S. at 418–419).

the area who could have removed the car or the drugs if a search and seizure was not made. The case is governed by *Chambers* v. *Maroney,* 399 U.S. 42, and accordingly there is no reason to defer disposition of the petition until after this Court decides the question as to the retroactivity of *Chimel* v. *California,* 395 U.S. 752.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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